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# National Judge: Some Reflections on Diversity in International Courts and Tribunals, The

Leigh Swigart  
*Brandeis University*

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# The “National Judge”: Some Reflections on Diversity in International Courts and Tribunals

Leigh Swigart\*

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Like their domestic counterparts, international courts and tribunals depend on public faith in their judges to inspire confidence in court decisions and in the judicial system more generally. These courts look for the same qualities in their judges as those laid out in national codes of conduct and other documents like the Bangalore Principles of Judicial Conduct, such as independence, impartiality, integrity, propriety, equality, competence, and diligence.<sup>1</sup> Both domestic and international courts also recognize that some relationships, involving such things as a prior connection to a case or the parties or an interest in the outcome of the case, might give rise to actual or perceived partiality.<sup>2</sup>

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\* Brandeis University, presentation at University of the Pacific, McGeorge School of Law, April 10, 2010.

1. BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

2. *Id.* § 2.5.

A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where: (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or (c) The judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

*Id.*

International courts, however, have something to contend with that domestic courts do not. Unlike domestic courts, international courts must consider the nationalities of its judges, and how these nationalities may affect the judges' ability to decide cases involving their states of origin with impartiality and independence. While this concern can be an issue in all of the major categories of international courts and tribunals—*i.e.*, human rights, interstate dispute resolution, and criminal—it may be most relevant in cases where states themselves are the parties before the court.

As an identifier, nationality suggests more than a mere category of citizenship or allegiance to a particular state. By extension, nationality also implies other characteristics that are pertinent to the work of an international judge, including linguistic knowledge and preferences, culturally-embedded worldviews and behaviors—some of which a judge may be unaware—and the professional understandings, perspectives, and habits that have been inculcated through a particular kind of legal training.

This Article will address these issues by exploring some of the challenges associated with judges' diverse nationalities in the context of international courts and tribunals. Some of these issues may fall outside of the usual rubric of "judicial ethics" or "judicial conduct" as one usually understands these terms. Nevertheless, these issues may have a notable impact on the performance of judges as they carry out their judicial function in multinational, multilingual, and multicultural institutions. As a result, it is likely that many judges will seek to monitor these issues closely, especially as the constituencies they serve and their very benches become increasingly diverse.

## I. HANDLING THE ISSUE OF NATIONALITY ON THE BENCH

Critics sometimes characterize international courts and tribunals as institutions that are more political than legal. They are, after all, generally created by political bodies—the United Nations, the Council of Europe, the Organization of American States, and the African Union, for example—and regulated by the results of the state's negotiations. In fact, some critics might even suggest that international judges act more like political agents than legal agents.

For an international judge, the most visible intersection between law and politics occurs in the realm of nationality. In a domestic court, the judge serves as a citizen of his or her country, and swears to uphold the law of the land so that his or her personal allegiance is aligned with his or her professional allegiance to serve as a guardian of the nation's laws. The international judge, however, faces at the very least a potential conflict between national loyalty and the application of the law. As such, questions arise regarding what will happen if the judge's interpretation of the law conflicts with the interests of his or her country.<sup>3</sup>

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3. DANIEL TERRIS, CESARE P.R. ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN*

Most international courts and tribunals address the nationality of their judges in some way, often trying to correct any existing or potential biases that may be seen to result from national origin or allegiance. What is striking, however, is that courts and tribunals seem to find various—and sometimes polar opposite—ways of addressing this challenge.

Before considering any concrete examples of how international courts and tribunals carry out the task of “nationality management,” two points should be made clear. First, in no international court or tribunal is a judge from a particular nation elected to play the role of “advocate” for that nation. All judges in international courts and tribunals are expected to act as any other judge— independent from their government and impartial while sitting on any case. The second point, however, is that in several international courts, each state party is allowed to appoint a judge “in respect of that state.” Thus, this specific judge is clearly associated with a particular state in a way that might not exist in courts where a relatively small number of judges are chosen from among many Member States.

The following sections describe several international courts and tribunals and their policies regarding a judge’s relation to a case involving his or her state.

#### A. *African Court of Human and Peoples’ Rights (ACHPR)*

The African Court of Human and People’s Rights is a new regional institution that rules on the compliance of African Union (AU) Member States with the African Charter on Human and Peoples’ Rights and with other human rights devices that are ratified by the states.<sup>4</sup> Cases may be submitted to the Court by AU Member States, African intergovernmental agencies, authorized Non-Governmental Organizations (NGOs), and, in certain circumstances, individuals.<sup>5</sup>

The court was created in 2004, elected its first bench in 2006, and delivered its first judgment in late 2009.<sup>6</sup> The court consists of eleven judges, each of whom comes from a different one of the fifty-three existing AU Member States.<sup>7</sup> The judges are elected through secret ballot by the Assembly of the Heads of State of the African Union, an organization that chooses these judges “from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights.”<sup>8</sup>

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INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES 151 (2007).

4. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 3, opened for signature June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), available at [http://www.africa-union.org/rule\\_prot/africancourt-humanrights.pdf](http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf) [hereinafter Protocol to the African Charter].

5. *Id.* at art. 5.

6. African Court on Human and Peoples’ Rights, Court, <http://www.african-court.org/en/court/judges/> (last visited Sept. 29, 2010) (on file with the *McGeorge Law Review*).

7. *Id.*

8. *Id.*; see Protocol to the African Charter, *supra* note 4, at art. 11.

The African court has adopted a seemingly logical and safe approach to nationality. Its protocol specifies that a judge who is a national of a state that is a party before the court cannot sit on that case.<sup>9</sup> Accordingly, the first case before the African court—*Yogogombaye v. the Republic of Senegal*<sup>10</sup>—saw most of the eleven judges sitting, excluding the judge of Senegalese nationality.

### B. European Court of Human Rights (ECHR)

Despite its status as a “sister” court to the ACHPR, the European Court of Human Rights (ECHR) approaches the issue of nationality in a very different manner. The ECHR covers a wide geographic jurisdiction—the entire Council of Europe has forty-seven Member States with approximately forty official languages among them.<sup>11</sup> While states, organizations, and individuals are permitted to bring complaints against Member States for alleged violations of human rights,<sup>12</sup> individuals submit the overwhelming majority of complaints. Each Member State of the Council of Europe has a judge who sits on the ECHR bench, and the European Convention sets forth the necessary requirements for those who wish to become a judge. It prescribes that “judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.”<sup>13</sup>

The sheer diversity of the ECHR jurisdiction means that the local expertise of a national judge—legal, linguistic, and cultural—is highly valuable, if not critical, in the consideration of the various cases brought against member states. For this reason, the national judge is normally *required* to sit on a case involving his or her state, often playing the role of “judge-rapporteur” on the seven-member panel by taking the lead in organizing the documents and proceedings.<sup>14</sup>

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9. Protocol to the African Charter, *supra* note 4, at art. 22. Article 22 on Exclusion states, “If a judge is a national of any state which is a party to a case submitted to the Court, that judge shall not hear the case.” *Id.*

10. *Yogogombaye v. Republic of Senegal*, Application No. 001/2008 (December 2009), available at <http://www.african-court.org/en/cases/latest-judgments> (follow “Judgment in the matter of Michelot Yogogombaye versus the Republic of Senegal, application No.001/2008” hyperlink).

11. See Council of Europe, Member States, <http://www.coe.int/aboutcoe/index.asp?page=47pays> (last visited Sept. 29, 2010) (on file with the *McGeorge Law Review*) (most of the former Soviet Union is now under the umbrella of the Council of Europe).

12. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 33-34, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/> (follow “English” hyperlink) [hereinafter European Convention of Human Rights]; see also EUROPEAN COURT OF HUMAN RIGHTS: THE ECHR IN 50 QUESTIONS, COUNCIL OF EUROPE 5 (Provisional Ed. 209), available at <http://www.echr.coe.int/ECHR/EN/HEADER/THE+COURT/INTRODUCTION/INFORMATION+DOCUMENTS/> (on file with the *McGeorge Law Review*).

13. Protocol to the African Charter, *supra* note 4, at art. 21.

14. *Id.* at art. 26; TERRIS, ROMANO & SWIGART, *supra* note 3, at 151-52; see also Martin Kuijer, *Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice*, 10 LEIDEN J. INT’L L. 49 (1999). The relevant text of Article 26 states:

It is interesting to note, however, that while judges at the ECHR are usually nationals of the states that put their names forward, this is not a requirement. Judges may instead hail from another Member State of the Council of Europe<sup>15</sup> or even from outside of Europe altogether.<sup>16</sup> The argument that the local or national expertise of judges is important in cases involving their states could potentially become moot if judges are not nationals of the state appointing them. In such cases, the particular rationale for the ECHR's "nationality management strategy" falls flat.

### C. International Court of Justice

The International Court of Justice is the oldest court with supranational jurisdiction in operation today. Established in 1948, the Court's role is "to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies."<sup>17</sup>

In the early days of international courts, the participation of judges in cases involving their own countries was considered an asset to the administration of justice. The Permanent Court of International Justice (and later the International Court of Justice) made explicit provisions for judges to sit on cases involving their own countries.<sup>18</sup> Reasoning that "states would be much more likely to have

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1. To consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up Committees for a fixed period of time. . . .

2. There shall sit as an *ex officio* member of the Chamber and the Grand chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

European Convention on Human Rights, *supra* note 12, at art. 26 (emphasis in original). For more information on the role of "rapporteur" in ECHR proceedings, see European Court of Human Rights, Basic Information on Procedures, <http://www.echr.coe.int/echr/en/header/the+court/how+the+court+works/procedure+before+the+court> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

15. Swiss national Lucius Caflisch sat in respect of Liechtenstein from 1998 to 2006. Since 2006, his compatriot Mark Villiger has filled the same position. See EUROPEAN COURT OF HUMAN RIGHTS: COUNTRY FACT SHEETS 1959-2009, COUNCIL OF EUROPE 46 (Provisional Ed. 2010), available at [http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS\\_ENG\\_MAI2010.pdf](http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf) (on file with the *McGeorge Law Review*).

16. *Id.* Canadian national Ronald St. John MacDonald sat in respect of Liechtenstein from 1980 to 1998.

17. International Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

18. See Statute of the International Court of Justice arts. 2, 3(1), 31, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/index.php?p1=4> (follow "Statute of the Court" hyperlink).

Article 2: The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

confidence in the court and therefore more incentive to bring cases before it and follow its judgments if each contending party had a judge on the bench.”<sup>19</sup>

It should be noted that the fifteen judges are chosen from among 192 Member States of the United Nations.<sup>20</sup> According to an unwritten rule, however, the five permanent members of the UN Security Council (China, France, Russian Federation, United Kingdom, and the United States) have always had their “seat.” This fact supports the criticism that politics do indeed play a role in the operation of some international courts.

If a Member State that is a party to a case does not already have a national from their state sitting on the bench, the ICJ permits that state to choose a judge ad hoc who will serve for the duration of the case. Given that there are only fifteen judges and 192 potential parties to disputes before the Court, this is quite a frequent occurrence. The judge ad hoc serves as a regular voting member of the court for that case, taking part “in the decision on terms of complete equality with their colleagues.”<sup>21</sup>

While the ICJ website frankly acknowledges that questions exist about the practice of appointing judges ad hoc, it points out that “numerous writers take the view that it is useful for the Court to have participating in its deliberations a person more familiar with the views of one of the parties than the elected judges may sometimes be.”<sup>22</sup>

On its face, the ICJ nationality strategy resembles that of the ECHR—it seems to acknowledge that diversity of parties before the court sometimes calls for “insider knowledge.” Even so, a party to the ICJ that is allowed to appoint a judge ad hoc “more familiar with its views” may not necessarily appoint a judge from its own state. In fact, it is not uncommon for a state to appoint a well-known international lawyer of another nationality as its judge ad hoc. This is because States may consider international lawyers to be more familiar, instead, with the workings of the ICJ itself. Not surprisingly then, some states have even chosen the ultimate insiders—former members of the regular ICJ bench—to serve as their judge ad hoc. So far, among the 145 appointments of ad hoc judges over the

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Article 3-1: The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

Article 31:

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge . . .
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

*Id.*

19. TERRIS, ROMANO & SWIGART, *supra* note 3, at 151.

20. United Nations, UN at a Glance, <http://www.un.org/en/aboutun/index.shtml> (last visited Oct 4, 2010) (on file with the *McGeorge Law Review*).

21. Statute of the International Court of Justice, *supra* note 18, at art. 31.

22. International Court of Justice, Judges Ad Hoc, <http://www.icj-cij.org/court/index.php?p1=1&p2=5> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

history of the court, only sixty-five have been of the same nationality as the state party that appointed them.<sup>23</sup>

There have been occasional calls for the abolition of “national judges” at the ICJ altogether. In other words, some individuals have advocated eliminating the practice of permitting permanent judges to sit on cases involving their own states and appointing judges ad hoc when the state before the court has no regular judge.<sup>24</sup> Setting aside the issue of perceived bias, what is it like to act as a judge ad hoc on the most powerful and prestigious international court? Do these judges really take part in “complete equality” with their colleagues?<sup>25</sup> One current judge ad hoc, speaking confidentially, lamented that, in fact, members of the regular bench assume that he is biased in favor of the state that appointed him and consequently do not take his views seriously.<sup>26</sup> He added that other judges ad hoc in his acquaintance have felt the same way—their colleagues on the bench do not value their views and draft judgments. Permanent judges, on the other hand, are assumed to be impartial, as they would have recused themselves from the case altogether had there been any question of bias.

The ECHR also allows state parties before the court to appoint ad hoc judges if the national judge is not available.<sup>27</sup> A former judge of that court similarly indicated that ad hoc judges suffer from the suspicion of bias since they are appointed when the facts of the case are already known. In a chamber of seven judges, he reported that having the deciding vote come from an ad hoc judge would create enormous tension.

#### D. International Criminal Courts

As stated before, the issue of nationality is perhaps the most salient in human rights and inter-state dispute resolution courts, where states are themselves

23. International Court of Justice, All Judges *Ad Hoc*, <http://www.icj-cij.org/court/index.php?p1=1&p2=5&p3=2> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*) (calculated after analyzing the choices of *ad hoc* judges by parties to all ICJ cases).

24. See Thomas Buerghenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 ARB. INT’L 495 (2006) (noting that at least one sitting ICJ judge believes that justice would be better served if the ICJ eliminated the practice).

25. See Statute of the International Court of Justice, *supra* note 18, at art. 31.

26. For this Article, the author conducted a series of confidential interviews with judges from a range of international courts and tribunals between January and March 2010. These and later remarks are drawn from the transcripts of these interviews.

27. Council of Europe, European Court of Human Rights: Rules of Court, R. 29 (June 2010), available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/> (follow “New Rules of Court” hyperlink).

1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, and unless that Contracting Party has opted to appoint an *ad hoc* judge in accordance with the provisions of paragraph 1(b) of this Rule, the President of the Chamber shall invite it to indicate within thirty days the name of the person it wishes to appoint from among the other elected judges.

*Id.*



parties. But does the nationality of a judge also come into play on the benches of international criminal courts and tribunals, where individuals of particular nationalities are being tried for war crimes, crimes against humanity, and/or genocide?

Consider the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda (the so called UN “ad hoc” tribunals). Despite the fact that there is no exclusionary language in the tribunals’ statutes, no judge from the regions where the crimes under consideration took place has ever served on their benches.<sup>28</sup> Some judges from those tribunals have underscored the common belief that persons from the Balkans or Rwanda would not have the proper distance from the horrific events that took place to judge those charged as responsible without bias.<sup>29</sup> These judges compared the situations with those in their home regions of Europe and Latin America, where it took decades before incidents related to war or civil conflict could be judged with impartiality.<sup>30</sup> They also suggested that had regional judges actually served on the Yugoslav and Rwanda tribunals, they might have found it necessary to recuse themselves frequently from cases, thereby impeding the efficient functioning of their courts.

But if one considers the rationale for having national judges sitting on their states’ cases at the ECHR and ICJ—their ability to provide special insight and familiarity—then the exclusion of judges from the Balkans and Rwanda is curious. It is undeniable that their cultural and linguistic expertise could have been very helpful in the course of the trials. In fact, throughout the history of the ICTY and ICTR tribunals, no judge has ever spoken Serbian-Croatian-Bosnian or Kinyarwanda, the languages frequently used by those testifying at those tribunals, respectively.<sup>31</sup> Instead, the tribunals have relied on interpretation, not without occasional linguistic and cultural problems of understanding.

The fear of bias on the part of judges from the affected regions is, of course, not surprising. How, then, can one rationalize the strategy adopted by so-called “hybrid” or “internationalized” criminal courts, where it is mandated that national judges join international judges in trying individuals from the former’s home country for war crimes, crimes against humanity, and genocide? The Special Court for Sierra Leone (SCSL),<sup>32</sup> the Special Tribunal for Lebanon

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28. See Statute of the International Criminal Tribunal for the former Yugoslavia arts. 13, amended Sept. 2009, available at <http://www.icty.org/sid/135> (on file with the *McGeorge Law Review*); Statute of the International Criminal Tribunal for Rwanda art. 12, Jan. 1, 2007, available at <http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx> (on file with the *McGeorge Law Review*).

29. Confidential interviews by author with judges of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (Mar. 2010) [hereinafter Interview].

30. For example in Germany after WWII, or in Argentina after the “Dirty War” (Guerra Sucia) of 1976-1983.

31. See *supra* note 26.

32. Statute of the Special Court for Sierra Leone art. 12, Jan. 16, 2002, 2178 U.N.T.S. 145, available at <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> (follow “Special Court Statute” hyperlink).

(STL),<sup>33</sup> and the Extraordinary Chambers in the Court of Cambodia (ECCC)<sup>34</sup> all adhere to this practice. The ECCC is distinctive, however, in that its statute also calls for co-investigating judges and co-prosecutors, each pair consisting of a Cambodian alongside an international.<sup>35</sup>

Some judges serving on those courts have expressed misgivings about this arrangement. One national judge sitting on a hybrid court asserts that national judges are impartial, but concedes that judicial partiality, either in favor of the prosecution or the defense, is sometimes perceived.<sup>36</sup> Another international judge on the same court raised a different issue—international judges are often better protected than their national counterparts despite the fact that the latter run significant risks by serving in the court at all.<sup>37</sup>

While ensuring the independence and impartiality of “national judges” clearly raises concerns in all of the courts previously mentioned, these concerns translate into several different methods of managing nationality: (1) barring their participation on cases that involve their state or co-nationals (ACHPR, and in practice if not by regulation, the ICTY and ICTR);<sup>38</sup> (2) requiring their participation on the same kinds of cases (ECHR);<sup>39</sup> (3) giving the option of their

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1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

- a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter “the Secretary-General”).
- b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

*Id.*

33. Special Tribunal for Lebanon, Chambers, <http://www.stl-tsl.org/sid/26> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*). “The Chambers of the Special Tribunal for Lebanon are composed of (i) one international Pre-Trial Judge, (ii) a Trial Chamber (three judges: one Lebanese and two international, plus two alternate judges, one Lebanese and one international), and (iii) an Appeals Chamber (five judges: two Lebanese and three international).” *Id.*

34. See Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228(B)/Annex, art. 3, U.N. Doc. A/RES/57/228(B)/Annex (May 22, 2003). Under Article 3 “Judges”:

(1) Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: “international judges”), on the other hand, shall serve in each of the two Extraordinary Chambers.

(2) The composition of the Chambers shall be as follows: (a) The Trial Chamber: three Cambodian judges and two international judges; (b) The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.

*Id.*

35. *Id.* at arts. 5-6.

36. See *supra* note 26.

37. *Id.*

38. Protocol to the African Charter, *supra* note 4; see *supra* note 27 and accompanying text.

39. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 12, at art. 26.

participation (ICJ);<sup>40</sup> and (4) making provision for cooperation between national and international judges on the same bench (SCSL, STL, and ECCC).<sup>41</sup> However, despite the fear of bias that the idea of “national judges” invokes, studies have not necessarily borne out its reality. Indeed, studies on this subject seem to show instead that judges do vote *against* their states, albeit usually not as often as *with* their states.<sup>42</sup> Even ad hoc judges have been known to vote against the state that appointed them, albeit with less frequency than regular judges.<sup>43</sup> Of course, their reasons for doing so may have nothing to do with national bias at all. Quite the contrary, their reasoning may in fact be based on other, very solid, legal grounds, making it difficult to determine with any certainty the influence of nationality on decision-making.<sup>44</sup>

Ultimately, is the concern really one of the potential bias and influence associated with a sitting judge’s nationality? Or is it rather the appearance of bias and influence, with nationality anchored in the public’s mind as “the prime mode of identification for actors in a multinational context”?<sup>45</sup> Adam M. Smith notes that, given increasing questions about such perceptions from both state and non-state actors, the effectiveness of international courts will be diminished if they “remain mired in increasingly dubious questions of nationality, citizenship and consequent doubts about judicial ‘independence.’”<sup>46</sup>

## II. BEYOND NATIONALITY: THE IMPACT OF TRAINING, LANGUAGE, AND CULTURE ON INTERNATIONAL JUDICIAL WORK

Nationality is quite a visible label to place on the judges who serve on international courts and tribunals, and its “content” is more or less universally understood. In fact, it is one of the major organizing classifications in the contemporary world, as noted above, and one that is not often questioned.

But what other kinds of labels might be used to characterize judges? Other descriptors might also provide insightful classification when talking about impartiality and the desire to strike a general balance on those courts and tribunals that cover diverse geographic jurisdictions. What is the relationship of national representation to the prominence of a particular tradition of legal thinking or of language and culture? Can an imbalance in these areas lead not

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40. See Statute of the International Court of Justice, *supra* note 18.

41. See *supra* notes 31-34 and accompanying text.

42. Adam M. Smith, “Judicial Nationalism” in *International Law: National Identity and Judicial Autonomy at the International Court of Justice*, 40 TEX. INT’L L.J. 197, 218-19 (2005); Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM. J. INT’L L. 224, 228-29 (1969). Eric A. Posner & Miguel De Figueiredo, *Is the International Court of Justice Biased?* 18 (U. Chi. L. & Econ., Working Paper No. 234, 2004).

43. See *supra* note 42.

44. Smith, *supra* note 42, at 218.

45. *Id.* at 205.

46. *Id.* at 230.

only to geo-political bias but to bias rooted in other kinds of individual attributes? Can it lead to difficulties in the work of international courts themselves?

A. *Legal Tradition Among International Judges*

In regard to judicial elections, the Statute of the International Court of Justice states that “the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”<sup>47</sup> Essentially, this means that judges are trained in one of two systems, either the common law or Romano-Germanic (civil) law system. Depending on where they come from, they may also have expertise in Islam or another body of religious or local customary law.

Almost all international courts and tribunals have a mixed bench of common and civil law judges. While these two systems both stem from Western legal traditions and possess many similarities, they also have some important differences—namely in their procedures. What impact, then, does this difference in legal tradition have on the smooth functioning of international courts and tribunals?

Apparently, the answer is “not as much as one might think.” Perhaps the biggest impact of mixed benches is felt in international criminal tribunals, where the differences between the adversarial and inquisitorial styles of conducting a trial, and lack of experience in one or the other, may mean some judges have to learn on the job. Since most of these tribunals adopt an approach to trial that mixes elements of both the adversarial and inquisitorial styles, judges generally do not have to learn a completely new set of rules.

When asked about working with colleagues from other legal traditions, Judge Thomas Buergenthal, the former United States judge at the ICJ, said the following:

Contrary to what some people believe, international law is a distinct legal system not unlike the civil law or common law system. That is, we share a common theoretical approach to the legal problems before us. In our analysis of a legal problem, we draw on the doctrines and methodologies of the international legal system. That unites us, regardless of where we judges come from. Moreover, most of my colleagues have studied international law not only in their countries but also in the major teaching centers of our field in the world. That, too, is a unifying factor.<sup>48</sup>

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47. Statute of the International Court of Justice, *supra* note 18, at art. 9.

48. TERRIS, ROMANO & SWIGART, *supra* note 3, at 99.

As a system “without a defined corpus, relying more on custom . . . than on ‘black letter law,’” it has been argued that international law can be somewhat amorphous.<sup>49</sup> The result of this ambiguity is that international judges, “when faced with a difficult issue, about which the international legal regime is ambiguous” may “return to their domestic judicial roots for guidance”<sup>50</sup>—that is, they may look to the law they know best.

While looking homeward is a logical reaction to such uncertainty, it also introduces another avenue for national bias—this time in favor of a judge’s legal reasoning rather than his or her nation or its interests. Indeed, two scholars assert that at the International Criminal Tribunal for the former Yugoslavia, judges cite common law jurisprudence much more frequently than that from civil law countries, despite the fact that most of the judges are from civil law countries, and the incidents being investigated primarily took place in one.<sup>51</sup> Professors Michael Bohlander and Mark Findlay consider this a sign that the legal reasoning carried out by some judges is not sufficiently broad-based or comparative.<sup>52</sup> They also think it does not bode well for the ICTY’s legacy, asking very pointedly, “how can the judges and the international community expect that the judgements [sic] [of the ICTY] will be accepted as legally sound, just and unbiased, or that their work will contribute to stabilizing the region and healing the wounds torn open by the Balkan Wars?”<sup>53</sup>

This same trend may well extend to other international courts and tribunals. Some have suggested that the predominance of legal practitioners with common law training—not only judges, but legal clerks and officers, and in criminal courts, prosecutorial staff and defense counsel—has led to a disproportionate citing of common law jurisprudence in the arguments and judgments of international courts and tribunals. The result, some fear, might be a decreased influence of civil law notions in the development of international legal thinking overall.

## *B. Language Diversity*

The relative power of legal reasoning derived from common and civil law systems cannot be considered in isolation from issues of language. Language differences often accompany—and may underscore—the divide that exists between legal systems and styles of reasoning.

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49. Smith, *supra* note 42, at 205.

50. Smith, *supra* note 42, at 205.

51. See Michael Bohlander and Mark Findlay, *The Use of Domestic Sources as a Basis for International Criminal Law Principles*, in *THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE* 3, 7-12 (Oceana Publications 2003).

52. *Id.*

53. *Id.* at 8.

In international courts today, one finds that the majority of those with a common law background are also native or near-native English speakers. Those with a civil law background, on the other hand, are usually native speakers of other languages, including French, which is paired with English in many courts as an official or working language.<sup>54</sup> English is also the language most frequently used by judges, attorneys, and staff who are *not* native speakers of either of their court's working languages.<sup>55</sup> For example, individuals who come from the states of the former Soviet Union or East Asia have rarely studied French. English is thus becoming much more widely spoken than French or other official languages on the benches of most international courts.<sup>56</sup> Moreover, some civil law judges, as well as their legal assistants, may have pursued advanced law degrees in the common law system in an English-speaking country, thereby becoming conversant in the law as well as the language.<sup>57</sup> In contrast, common law lawyers are less likely to have had training in civil law or other legal systems, or, if they are native English speakers, to have competence in any other language at all.<sup>58</sup>

It has been suggested that the combined result of these various patterns is that those working in institutions of international justice are reading and citing English-language sources and common law sources with increased frequency.<sup>59</sup> Consequently, as noted above, the civil law influence in the development of international law may be weakened.

But the existence of a possible bias toward a particular source of legal thinking is just one language issue facing international courts and tribunals, and it derives from the global domination of English not only in the sphere of law but in many other spheres as well. Other language challenges in international courts do not derive from a *limitation* of languages but instead from the unavoidable *multiplicity* of languages that culturally, ethnically, and geographically diverse judges and court staff bring with them to their jobs. This simple fact differentiates the international justice system from most of its domestic counterparts, and it has significant implications for the ways in which international courts carry out their work.

Judges of different nationalities need not only to communicate with one another—in person and through their writing—but also to interact with the parties before the court. This means that translation and interpretation play an essential role in the work of international courts, which can create many challenges. These challenges include: using translation effectively for discussion

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54. BRANDEIS INST. FOR INT'L JUDGES, INTERNATIONAL JUSTICE: PAST, PRESENT, AND FUTURE 19-21 (Stephanie Cartier ed., Brandeis Univ. 2009), available at <http://www.brandeis.edu/ethics/internationaljustice/biij/index.html> (follow "Institute Report" hyperlink).

55. TERRIS, ROMANO & SWIGART, *supra* note 3, at 75-78.

56. *Id.* at 72.

57. *See id.* at 17-18.

58. *Id.*

59. Cesare P.R. Romano, *The Americanization of International Dispute Resolution*, 19 OHIO ST. J. ON DISP. RESOL. 89, 115-18 (2003).

and deliberation within panels of judges who share no common language; translating documents constantly and rapidly so that a trial can proceed smoothly; finding trained interpreters for certain languages, particularly those that are not world languages or do not have a written tradition; taking note of the “translation drift” that can come with both translation and interpretation;<sup>60</sup> and, last but not least, managing the costs of supporting all of this language diversity.

These problems are particularly acute in international criminal tribunals. In these institutions, the availability of good interpretation extends from simple pragmatics to the preservation of fair trial rights. One judge from an international criminal tribunal even described one linguistically complex case as a “Tower of Babel.”<sup>61</sup> While the chamber was mostly English-speaking and the defense team was French-speaking, the witnesses and victims testified in the language of their home country that had only a regional reach.<sup>62</sup> The participants in the case were constantly calling for interpretation, and the translation of documents further slowed the flow of the trial. The judge reported that in terms of both time and money, the cost was immense.<sup>63</sup>

In the end, there is no other solution to language diversity in international courts but to embrace it. In one session of the Brandeis Institute for International Judges, a European judge noted: “European law is multilingual law. For the legitimacy of the court, it is important to have many languages on board. The cost argument should not be taken into account—some costs are inherent to a democratic order.”<sup>64</sup>

### C. *Cultural Differences*

Culture is a huge and amorphous category to examine. Even if judges have been trained in the same legal tradition, local ways of perceiving the world and adapting to it may have shaped their views on the work they do and how it ought to be performed—indeed, it may have shaped their very notion of justice. After all, a common law judge may be from the United Kingdom or Kenya, and a civil law judge from France or Cambodia.

In which areas of international courts and tribunals might cultural differences impact judicial work? International judges may have, for example, varying conceptions of an appropriate “work ethic.” Their conceptions may be reflected by how many hours a day they put into their judicial work, how much they delegate to their legal assistants, and how much they shoulder in the context of

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60. Martin Weston, *Characteristics and Constraints of Producing Bilingual Judgments: The Example of the European Court of Human Rights*, in JEAN-CLAUDE GÉMAR & NICHOLAS KASIRER, *JURILINGUISTICS: BETWEEN LAW AND LANGUAGE* 445, 458 (2005) (noting that translation and interpretation “sometimes make[] the quotation of isolated words and phrases difficult.”).

61. BRANDEIS INST. FOR INT’L JUDGES, *supra* note 54, at 22.

62. *Id.*

63. *Id.*

64. *Id.* at 25.

the collective effort of a judicial panel. International judges may also come from societies where formality and hierarchy are respected to differing degrees, where perceptions of appropriate gender-specific behavior are different, and where civility of address in the courtroom or in other professional contexts is valued more or less highly. More fundamentally, judges may come from societies where their very notions of justice and appropriate punishment may not match as well as they assume.

Nevertheless, most international judges have already “adjusted” many of their culture-specific notions and behaviors, out of necessity, to fit a more universal norm. Many have had wide international experiences before joining their bench, some of them by working as diplomats or by studying abroad. They have advanced to this point in their careers having survived the close scrutiny of judicial nominations, appointment committees, or a series of elections—and they have survived for good reason. Thus, in most cases, their cosmopolitanism allows them to make a smooth adaption to the work of an international bench.

#### *D. What Else Counts?*

Many other common organizing principles of humanity, besides the powerful one of nationality, have not been discussed here. These include race, religion, and gender. The first two might be implied by nationality, at least for some regions of the world. Nationality becomes, in a sense, a “cover” for both race and religion. One assumes that judges of sub-Saharan African countries will be Black and those from the Far East will be Asian, although there could be exceptions. Individuals may also assume that a Pakistani judge will be Muslim and an Irish judge will be Catholic. Might the background of these judges have some impact on their thinking on matters before their court? Have these aspects of their experience not shaped them as surely as has their national affiliation? And if so, might a certain bias be inferred from these individual attributes, just as with nationality? Or, alternatively, might they provide a special insight into, or familiarity with, a case if one follows the rationale used by some courts for *including* national judges on cases involving their own state?

The statutes of international courts are curiously silent on these matters, even in regions like Africa where religious affiliation has often been an important identifier, and where one might think that a court would want to achieve a “representative” balance. For some reason, nationality has historically trumped most other identifiers in the world of international courts and tribunals.

Gender, however, is another matter. Gender is the one organizing principle, besides nationality, where some courts have chosen to create, or felt pressure to create, a semblance of parity. The official documents of some international courts—for example, the ICC, the ACHPR, and the ECHR—specifically mention



the need to create gender balance on the bench.<sup>65</sup> Consequently, there tend to be higher percentages of female judges in these institutions, if not complete parity.<sup>66</sup> Compare this to the ICJ where, until mid-2010, it had only had a single woman judge over its more-than-sixty-years of history, Dame Rosalyn Higgins, who ended her career at the court by serving as president.<sup>67</sup> Furthermore, the International Tribunal for the Law of the Sea, active since 1996, has had an entirely male bench to date.<sup>68</sup>

It is important to note that the criminal and human rights courts traditionally strive for a more equitable gender balance. Some argue that these courts in particular derive a substantial benefit from the special insight that women bring to their cases. This is especially so in those cases involving women in disproportionate numbers—such as women’s rights and sexual violence cases. Outspoken judges on criminal and human rights courts have been particularly vocal about the importance of having women on the bench when such violations are being examined.

What conclusions can one draw about these issues that are “beyond nationality”? Are legal training, language, culture, and other attributes important to consider when judges are nominated for a seat on an international bench?

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65. See Protocol to the African Charter, *supra* note 4, at art. 12 (“Due consideration shall be given to adequate gender representation in the nomination process.”); Rome Statute of the International Criminal Court art.36:8(a) July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm> (follow “Composition and Administration of the Court” hyperlink) (“The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: . . . [a] fair representation of female and male judges.”). See also COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *Procedure for Electing Judges to the European Court of Human Rights*, AS/Jur (June 15, 2010) 12 rev 2, available at [assembly.coe.int/CommitteeDocs/2010/20100504\\_ajdoc12rev.pdf](http://assembly.coe.int/CommitteeDocs/2010/20100504_ajdoc12rev.pdf) (on file with the *McGeorge Law Review*). In pertinent part:

7. In its Recommendation 1429 (1999), the Assembly made proposals for nominating candidates at national level, recently reiterated in Resolution 1646 (2009). By its Order 558 (1999), it instructed its Sub-Committee on the election of judges “to make sure that in future elections to the Court member states apply the criteria which it has drawn up for the establishment of lists of candidates, and in particular the presence of candidates of both sexes”.

8. In January 2004, the Assembly adopted Resolution 1366 (2004) and Recommendation 1649 (2004). In these texts, it confirmed the necessity to keep the procedure of selection which had been set up. It also emphasised the need to receive candidates all having the required level to exercise the function of judge as well as the need for gender balance. It decided not to consider lists of candidates not fulfilling those criteria. Resolution 1366 (2004) was subsequently modified by Resolution 1426 (2005) and Resolution 1627 (2008) by which single-sex lists of candidates would only be considered if the sex is under-represented (under 40 % of judges) or if exceptional circumstances exist to derogate from this rule.

*Id.*

66. As of September 2010, eleven of nineteen ICC judges were women, the highest percentage on any international court to date. Only two of eleven judges of the African court were women, and there were only seventeen female judges of forty-seven at the ECHR.

67. Joan Donoghue of the United States and Xue Hanqin of China joined the court in September of 2010. See International Court of Justice, All Members, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

68. See International Tribunal for the Law of the Sea, General Information: Judges, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

Should nationality still be considered the most significant aspect of an international judge's many traits and qualities? Is it the one that makes or breaks his or her judicial appointment?

A case in the Extraordinary Chambers in the Court of Cambodia presents some food for thought. The first person tried by the ECCC was Kaing Guek Eav, also known as "Duch."<sup>69</sup> Three decades ago, Duch, a prison chief, oversaw the torture and killing of more than 15,000 men, women, and children, along with Cambodia's Khmer Rouge movement. He faced charges of crimes against humanity, war crimes, torture, and murder. A March 2010 update on the Cambodian court from the Open Society Initiative describes the closing of his trial like this:

The closing arguments were dramatic. Counsel for Duch reversed the position consistently articulated by the defense throughout the six-month public trial in which Duch acknowledged responsibility for the charged crimes and asked for mercy from the court and forgiveness from the victims. During the closing arguments, Kar Savuth, Cambodian counsel for Duch, and Duch himself surprised the full courtroom (as well as Duch's international counsel, Francois Roux) by requesting an acquittal and immediate release. The sudden turnabout revealed significant differences between Duch's international and Cambodian defense counsel. In the final moments of the argument, Duch confirmed that Cambodian defense counsel Kar Savuth spoke for him in requesting acquittal and immediate release.<sup>70</sup>

A March 19, 2010 article from *Voice of America Khmer* highlighted some of the difficulties faced by the judges—three Cambodians, an Australian, and a Frenchman—in the first trial of the Cambodia Court:

A Khmer Rouge tribunal verdict in the trial of Kaing Kek Iev, the prison chief better known as Duch, is expected in June, although judges face numerous complexities brought about by the hybrid, international nature of the UN-backed court.

Duch's trial, which ended in November 2009, was a test case for the court. Prosecutors have asked he be given 40 years in prison, while the defense asked for leniency. In his monthslong [sic] trial, Duch took

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69. Extraordinary Chambers in the Courts of Cambodia, Kaing Guek Eav, Case File No. 001/18-07-2007/ECCC-TC, <http://www.eccc.gov.kh/english/caseInfo001.aspx> (follow "Case Information Sheet" hyperlink) (last visited Oct. 4, 2010) (on file with the *McGeorge Law Review*).

70. THE OPEN SOC'Y JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 3 (Open Society Institute 2010), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/cambodia-20100324](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324) (follow "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, March 2010" hyperlink).

responsibility for the deaths of thousands of Cambodians and asked families of his victims to forgive him.

In a lengthy interview with VOA Khmer, Lars Olsen, a spokesman for the tribunal, said *the case was complicated in terms of the laws involved, the differences in languages among international and Cambodia judges and their search for a suitable punishment.*

“They will look at what is normal in other courts in dealing with crimes against humanity and with war crimes when they make decision [sic]” Olsen said.<sup>71</sup>

It would appear that it is exactly the kinds of individual characteristics that international courts do not account for in the selection of judges—those that are “beyond nationality”—that were playing out powerfully on the stage of this international criminal trial in Cambodia.

### III. WHAT ARE THE IMPLICATIONS FOR THE WORK OF JUDGES— INTERNATIONAL OR OTHERWISE?

What does all this diversity—national and beyond—mean for the functioning of the international judiciary? Studies appear to show that nationality does not definitively impact the decision-making of judges, contrary to the general assumption that it *must*. That doesn’t necessarily mean that nationality and other individual attributes do not influence the way a judge thinks. Not even the strictest insistence on judicial impartiality can entirely separate a judge from his or her personal circumstances, nor would this necessarily be desirable.

The study of judges serving in international courts shows, in fact, that they tend to seek creative and appropriate ways to allow their life experiences to inform their work. Working alongside colleagues with very different backgrounds, judges find that matters of perspective, informed by personal experience, inevitably play a part in their daily work. In efforts to understand the extreme and dramatic evidence before them, especially in criminal trials, judges find that they need to seek points of reference in their own personal or national experiences.<sup>72</sup>

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71. Kong Sothanarith, *Verdict Expected in June for ‘Complicated’ Duch Case*, VOA KHMER, March 19, 2010, <http://www1.voanews.com/khmer-english/news/a-40-2010-03-19-voz9-90234807.html> (on file with the *McGeorge Law Review*) (emphasis added). On 26 July 2010, the court found Duch guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949 and sentenced him to 35 (thirty-five) years of imprisonment. Press Release, Extraordinary Chambers in the Courts of Cambodia, Kaing Guek Eav Convicted of Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 1949 (July 26, 2010) available at [http://www.eccc.gov.kh/english/press\\_release.list.aspx](http://www.eccc.gov.kh/english/press_release.list.aspx) (on file with the *McGeorge Law Review*).

72. TERRIS, ROMANO & SWIGART, *supra* note 3, at 207.

They may also turn toward their colleagues for the insights they can provide from theirs.<sup>73</sup>

Diversity brings with it, of course, many tensions. But within these tensions, there exists an enormous potential for the creation of new and powerful collective approaches to justice that can honor the multiplicity of national and cultural understandings—both inside the courts and around the world at large. One international court president once commented on how daunting it was that his bench seemed like such a mixed bag. But with time, he found that the institution's mission was so compelling that the judges were able to "start working together and reconcile their differences in order to form a united approach to justice."<sup>74</sup>

It is important for the future of their institutions that international judges be seen as forming a united front, and not as a jumbled-up professional group with too many mismatched nationalities and backgrounds. Most international courts and tribunals are relatively new and still proving themselves to the world. Countries often ask themselves, are they necessary? Are they accomplishing their respective aims? Are they too political? Are they worth the expense? For one thing, these institutions cannot take for granted the support, both moral and financial, that is automatically granted to domestic judiciaries around the world.

Given this context, the issue of the nationality of judges and what it implies for the judicial process comes back with full force. Nationality may not, in the end, have much influence on how a judge reasons, but the existence of the "national judge" in international courts and tribunals may still raise suspicions in the public mind about judicial impartiality and independence—and these are suspicions that these institutions can ill afford.

How does this discussion of the national judge in international courts and tribunals translate into the domestic sphere? Just as "national judges" may be suspected of partiality, United States judges from minority groups may be questioned about their allegiance to particular sectors of the United States population—the suggestion being that this allegiance might unduly sway their decision-making.

In 2009, many people followed with great interest the confirmation hearings and debate over the nomination of Sonia Sotomayor to the United States Supreme Court. Would her "wise Latina" remark be her undoing, suggesting that her background would somehow dictate how she ruled?<sup>75</sup> The suspicion

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73. *Id.* at 207-08.

74. *Id.* at 65.

75. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."); see Sonia Sotomayor, *Foreword* to DANIEL TERRIS, CESARE P.R. ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES*, at ix (University Press of New England 2007) (suggesting that United States judges have much to learn from international courts and their judges. She was asked several times during her confirmation hearings about this comment and what it implied about her openness toward looking

surrounding Sotomayor's background and what it implied for her ability to judge is reminiscent of a much earlier United States Supreme Court nomination. Accused of possessing "irredeemable prejudices," Louis D. Brandeis, the first Jewish Supreme Court Justice, was nonetheless confirmed and served with great distinction.<sup>76</sup>

Similar to international courts, the United States judicial system seems to have recognized that differences of background make for a rich and productive mix on the bench—a mix that can not only contribute to the judicial work of a court but can also signal to the public that their community (be it an ethnic group, religious group, or language group) is being represented in a multicultural society. For symbolic reasons, this is important even if it does not necessarily improve the functioning of the courts themselves.

But perhaps there are limits to how much courts should bow to the pressure to be representative of the constituencies they serve—be they worldwide, nationwide, or statewide. In conclusion, one may consider these reflections on judicial bias and its appearance by a former domestic judge in Europe who has since become an international judge:<sup>77</sup>

It may still be wiser from a pragmatic viewpoint that [international criminal judges] not sit in judgment in cases involving their own nationals. It is not that international judges are any more likely to be biased in favor or against their own nationals than, for instance, a US judge trying a US citizen in New York. But it would be a potential "perception of bias" that can easily be avoided. In the UK, there are already black defendants wanting black jurors. So far as I know, that hasn't yet extended to a demand from, say, a Hindu to have a Hindu judge. I hope we can avoid going down that road at all and have a rule of law for what it is and ought to be.

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outside of the United States for legal sources.).

76. See Daniel Terris, *Confirmation and Controversy: Do you Hear an Echo in the Halls of Justice?*, BRANDEIS UNIV. MAGAZINE, Fall 2009, at 4.

77. See *supra* note 26.